IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
SAWYER, P.J., and SAAD and RIORDAN, JJ.

In re WILLIAMS, Minors.

Supreme Court No. 155994
Court of Appeals No. 335932
Macomb Circuit Court, Family Division
LC No. 2012-0291-NA; 2012-0292-NA

BRIEF OF AMICUS CURIAE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

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STANDARD OF REVIEW

Issues involving the application and interpretation of the Michigan Indian Family Preservation Act are questions of law and are reviewed de novo. *In re Morris*, 491 Mich 81, 97; 815 NW2d 62, 69 (2012).

INTEREST OF AMICUS CURIAE

The Sault Ste. Marie Tribe of Chippewa Indians files this brief pursuant to the September 27, 2017 Order of this Court granting the application for leave to appeal and inviting the Tribe and other groups to file an amicus brief. Michigan Supreme Court Order, Dckt. No. 155994 (Sept. 27, 2017).

The Tribe has been involved with this case since it was notified that two of their citizen children had been removed from their parents. The Tribe's particular interest in this case is the health, safety, and wellbeing of the Sault Tribe children involved. The Tribe also has an interest in ensuring the protections of MIFPA and ICWA are applied in a uniform matter to protect the interests of the Tribe, its children, and their parents.

STATEMENT OF FACTS

The Tribe generally concurs with the State's statement of facts with the following additional facts specific to the Tribe's brief. On August 9, 2012, the Department of Health and Human Services (DHHS or Department) filed a petition in Macomb Circuit Court, Family Division, requesting the court take jurisdiction over JJW and ELW—a two year old and newborn, respectively—and remove them from their parents. Sault Tribe supported the removal as did the qualified expert witness who testified at the removal/preliminary hearing regarding active efforts and the risk of harm.

While JJW and ELW became wards of the Macomb County Circuit Court in August 2012, this was not the first encounter DHHS had with the family. DHHS filed a petition requesting jurisdiction (and removed the children) in the Otsego County Circuit Court on October 6, 2010 for concerns regarding substance abuse and the parents' refusal to engage in services without a court order. The children were returned home October 12, 2010 with in-home care jurisdiction until the case was closed May 31, 2011. The state filed another petition regarding JJW on August 2, 2011 in Otsego County Circuit Family Division. Appellant was adjudicated in that case on September 22, 2011, and the court entered a disposition order. Eventually, the Court returned JJW home on March 23, 2012 with in-home services, and closed the case on May 22, 2012.

The Department opened the current case less than three months later. There, after providing reunification services to both parents and the children for almost two years, DHHS filed a petition to terminate the parental rights of both parents.[1] Realizing the father had not been separately adjudicated as required under *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), the Department sought to adjudicate the Appellant. He was subsequently adjudicated and ordered to continue with the same case services. Both parents were given additional time to engage in services and complete their treatment plan. The Department filed a second petition to terminate parental rights in the case on May 8, 2015.

On May 15, 2015, prior to a hearing on the petition to terminate parental rights, the Appellant released his parental rights to both JJW and ELW by executing "Release of Child by Parent," as well as "Statement to Accompany Release" for each child. The "Release of Child by Parent" SCAO form, PCA 305, was last updated in September 2010, prior to the enactment of the Michigan Indian Family Preservation Act (MIFPA), MCL712B.1 et seq., and cites to 25 USC 1913(a), MCR 3.801, MCL 710.54, MCL 710.28, and MCL 710.29 as authority.

Since July 2016, the children have been in their current, Sault Tribe approved placement, and the placement family has filed an intent to adopt the children. However, Appellant now wants to revoke his release of parental rights,

[1] This case began just prior to this Court's holding in *In re Sanders*, 495 Mich 394 (2014), so the father was initially unadjudicated, and fell under the mother's case until father's adjudication and disposition, orders dated August 22, 2014.

and have the children placed back with him. He argues MIFPA provides the authority for him to request this relief.

Finally, and unfortunately, the children involved in this case now have a sibling who was born drug-exposed, and was removed from the Appellant at birth. The Oakland County Circuit Court Family Division has ongoing jurisdiction over that child. While this appeal is limited to the issue that Petitioner has no right to withdraw his release to terminate his parental rights prior and up to entry of the final order of adoption to the children in the Macomb County case, the on-going Oakland case is relevant to this Court's ultimate interpretation of MCL 712B.13.

ARGUMENT

I. The Plain Language of the Michigan Indian Family Preservation Act Distinguishes Between the Protections Provided Under a Direct Placement Consent and a Release of Rights to the State.

The Michigan Indian Family Preservation ("MIFPA"), MCL 712B.1 et seq., applies to cases involving Indian children. Here, both ELW and JJW are Indian children as are citizens of the Sault Ste. Marie Tribe of Chippewa Indians. They, their parents, and the Tribe receive important protections guaranteed by MIFPA, and the Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., the federal law MIFPA is based on. The question in this case is which of these protections apply to this situation.

MIFPA governs both voluntary proceedings, such as direct placement adoptions, and involuntary ones, such as those of abuse and neglect. In the former, parents are afforded certain rights and protections, including the right to withdraw their consent to an adoption prior to the final order of adoption. MCL 712B.13(3). In the latter, parents are afforded due process protections including notice, heightened burdens of proof, active efforts to reunify the family, and the testimony of a qualified expert witness. MCL 712B.15. There are times, however, when a parent may choose to relinquish their parental rights in an involuntary proceeding for various reasons. The question then is whether they get the protection of revocation under MCL 712B.13(3) by voluntarily foregoing those protections in MCL 712B.15. The answer to this question is no—in that situation, the parent's release is

governed by MCL 712B.13(5), which ensures the State still follows certain requirements in MCL 712B.15.

In interpreting statutory language, Michigan courts consider and give effect to the Legislature's intent by looking to the plain language of the statute. *In re KMN*, 309 Mich App 274, 286; 870 NW2d 75, 81 (2015). Generally, the courts give effect to the meaning of the statute when read as a whole. *Id.* Where a statute's language is unambiguous, Michigan courts enforce the statute as written. *Id.* The title of the section of statute at issue here, "Voluntary consent to guardianship, placement, or termination of parental rights; requirements; execution of consent or release; form and contents," suggests any consent or release given under MCL 712B.13 must be voluntary. However, MCL 712B.13 has six subsections that define and differentiate how a voluntary consent or release works under MIFPA.

MCL 712B.13 begins with an overarching provision:

> (1) If both parents or Indian custodian voluntarily consent to a petition for guardianship …, or if a parent consents to adoptive placement or the termination of his or her parental rights for the express purpose of adoption by executing a release under sections 28 and 29 of chapter X, or consent under sections 43 and 44 of chapter X the following requirements must be met . . .

Then the section differentiates between consent for the purposes of adoption:

> (3) If the placement is for *purposes of adoption*, a consent under subsection (1) of the Indian child's parent must be executed in conjunction with either a consent to adopt, as required by sections 43 and 44 of chapter X, or a release, as required by sections 28 and 29 of chapter X. A parent who executes a consent under this section may withdraw his or her consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the Indian child. Once a demand is filed with the court, the *court shall order the return* of the Indian child.

MCL 712B.13 (emphasis added).

And a release for the purpose of ending "pending proceedings", which is an involuntary abuse and neglect proceeding:

> (5) A release executed under sections 28 and 29 of chapter X during a *pendency of a proceeding* under section 2(b) of chapter XIIA is subject to section 15 of this chapter. If the release follows the initiation of a proceeding under section 2(b) of chapter XIIA, the court shall make a finding that culturally appropriate services were offered.

MCL 712B.13(5)(emphasis added).

The Legislature did not intend MCL 712B.13(3) to apply universally to consents and releases especially when its application is contrary to other subsections governing a voluntary consent or release. Under MIFPA, a parent who executes a consent to a direct placement adoption under sections 43 and 44 of chapter X is within his right to withdraw consent at any time prior to the entry of the final order for adoption. MCL 712B.13(3). However, this case involves a release done under sections 28 and 29 of chapter X during a pendency of a proceeding under section 2(b) of chapter XIIA. Therefore, MCL 712B.13(5) applies, and points the court to MCL 712B.15.

MCL 712B.15 outlines the requirements for a termination of parental rights for parents of Indian children:

> If an Indian child is the subject of a child protective proceeding under section 2(b) of chapter XIIA, *including instances in which the parent executed a release under section 28 of chapter X during the pendency of that proceeding* . . .and if a parent does not provide consent as described in section 13 of this chapter, the following requirements must be met . . .

MCL 712B.15(1)(emphasis added). Those requirements include proper notice and adherence to MCL 712B.15(2) - (4), which include a heightened burden of proof and the testimony of a qualified expert witness. Indeed, these protections are designed for the Indian parent and family to ensure the termination of parental rights is done with the due process protections required by federal law. *See* 25 USC 1912(f).

However, there is no provision that allows a parent to withdraw his release of parental rights in a pending proceeding under section 2(b) of chapter XIIA. That protection is for parents who are entering into a direct placement adoption. Therefore, in this case the controlling statutes are MCL 712B.13(5) and MCL 712B.15. Effectively, MIFPA treats releases of parental rights that occur during pending abuse and neglect proceedings separately from consents in a direct placement adoption proceeding. Indeed, this mimics the structure of the federal law that would govern the case absent MIFPA. *Compare* 25 USC 1912, *with* 25 USC 1913.

The language the Legislature used to tailor the right to withdraw a release only under a direct consent adoption demonstrates the Legislature's intent to incorporate the purpose of ICWA into MIFPA. Similar to MIFPA, ICWA separates voluntary and involuntary child custody proceedings. In its section on voluntary termination of parental rights, ICWA's relevant language states:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final

> decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

25 USC 1913(c).

MIFPA's language on voluntary termination of parental rights generally tracks ICWA's language on the voluntary termination of parental rights. *See id*; *see also* MCL 712B.13(3) ("A parent who executes a consent under this section may withdraw his or her consent at any time before entry of a final order of adoption by filing a written demand requesting the return of the Indian child…").

In ICWA's section on involuntary child custody proceedings, "Pending Proceedings," ICWA provides further guidance to state courts, mandating special protections for parents in those proceedings, such as required remedial services, qualified expert witness testimony, and findings on the record prior to terminating a parent's rights. 25 USC 1912. These same protections are guaranteed in MCL 712B.15. But this section of ICWA does not address situations where a parent consents to a termination or release of parental rights, nor allows for a revocation of that consent.

This is because, unlike ICWA, MIFPA was drafted to fit Michigan law, and contemplates protections for a parent who may voluntarily release his parental rights during pending involuntary proceedings, or who enters into a voluntary guardianship that becomes involuntary. *See Empson-Laviolette v. Crago*, 280 Mich App 620, 627-8; 760 NW2d 793, 799, (2008) (applying ICWA to guardianships). The Michigan legislature intended MIFPA to ensure ICWA's purpose, while also increasing the protections of certain rights to Indian parents, children, and tribes.

See 25 USC 1921. MIFPA adds the language to distinguish between a direct consent adoption and a release to the state in neglect-abuse cases.

Therefore, the Legislature did not intend for *all* consents and releases to be governed by the same provision allowing for withdrawal of consent at any time prior to the entry of the final order for adoption. MIFPA recognizes the spirit of *In re Toler*, 193 Mich App 474; 484 NW2d 672 (1992), by allowing for a voluntary release of parental rights where appropriate, but ensuring the rights MIFPA and ICWA guarantees to the parents of Indian children in involuntary proceedings through MCL 712B.13(5). Since the Legislature dedicated an entire subsection to the voluntary release of parental rights executed during pending proceedings, the Legislature did not intend to create a loophole to allow parents to circumvent pending proceedings.

Here, the Appellant voluntarily released his parental rights during pending proceedings that were initiated by DHHS because of his neglect of his children. Therefore, the Appellant's release falls under MCL 712B.13(5) and MCL 712B.15.

II. Adopting the Appellant's Argument Would Lead to Absurd Results Disfavored by This Court.

Not only does MIFPA's statutory language unambiguously state Petitioner's voluntary release is governed under MCL 712B.15, established Michigan precedent means allowing Appellant to withdraw release under MCL 712B.13(3) would lead to absurd results. *See Rafferty v. Markovitz*, 461 Mich. 265, 270; 602 NW2d 367, 369

(1999) (stating that in interpreting a statute, a court must construe the statute in accordance with its plain language and to prevent absurd results).

Michigan law does not support the notion that a parent, through his or her voluntary actions, may change the nature of pending proceedings DHHS has commenced. See MCL 712A.1, *et seq; In re Toler*, 193 Mich App at 475 ("Respondent's decision to consent to the termination of his parental rights does not transfer the proceeding from the juvenile code to the adoption code."). Though a parent may choose to voluntarily release his or her rights during a neglect-abuse proceeding in order to avoid a trial or other negative consequences of having parental rights terminated after an evidentiary hearing, a voluntary release does not change the nature of those underlying involuntary proceedings.

Similarly, under MIFPA, parents cannot change the nature of pending proceedings due to a voluntary release of parental rights. In this case, months after the Appellant voluntarily released his parental rights to the Department during involuntary pending proceedings, he now argues MIFPA allows him to withdraw that release and have his children returned to him. Allowing Appellant, or similarly situated parents, to withdraw a release of their parental rights any time prior to an order of adoption, with no substantial completion or benefit of services intended to reunify the family, and have their children immediately returned to them defeats the purpose of the state's child dependency system.

Alternatively, take as an example a respondent father who releases his rights while there are pending proceedings against him involving criminal sexual conduct

against his child. If the child stays with her non-respondent mother, there will *never* be a final order of adoption—in other words, the father could revoke his release at any point and begin custody proceedings while having avoided the abuse proceedings.

Under MCL 712B.15, parents who are in involuntary abuse and neglect proceedings have a set of due process protections to govern those proceedings—this is the heart of both MIFPA and ICWA. However, allowing parents in an involuntary proceeding to release their parental rights at any time, and then revoke that release prior to a final order of adoption *and* have their child returned to them immediately is absurd, circumvents the adjudicative process, and renders the 712B.15 protections superfluous.

III. If This Court Finds for the Appellant, The Tribe Requests the Court Give the Trial Court Specific Instructions Regarding the Placement of the Children and to Re-open the Pending Proceedings the Appellant's Release Ended.

Michigan's appellate court may instruct a trial court to make findings consistent with its opinion on remand. *See e.g.*, *Empson-Laviolette*, 280 Mich App at 634. However, in MIFPA and ICWA cases, the Court of Appeals has also provided instructions to trial courts in how to properly apply its interpretations of ICWA to the case at hand on remand, even providing for instructions for new proceedings to begin. *See In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 65; 874 NW2d 205, 213 (2015) (remanding with instructions for the trial court to properly articulate its findings and legal conclusions on the record); *see also In re Morris*, 491 Mich 81; 815

NW2d 62 (2012) (setting out specific procedural ICWA requirements the trial court must determine on remand including instructions for new proceedings to begin where compliance with ICWA was found); *Empson-Laviolette*, 280 Mich App at 633-34 (directing the trial court to terminate guardianship and effectuate the return of an Indian child to his parent on remand where ICWA was improperly applied).

If this Court finds the Appellant may withdraw his consent under MCL 712B.13(3), the Tribe requests this Court to instruct the trial court on the proper points of law on remand. On remand, the trial court may determine the Appellant's case must remain under the Adoption Code because of case law requiring his voluntarily release of rights be done there rather than under the Probate/Juvenile Code. *In re Toler*, 193 Mich App at 475. That means the trial court may have to order the children be moved immediately from their current placement to the Appellant.

However, the facts of the initial neglect-abuse proceedings have not changed before, during, or after Appellant attempted to withdraw his consent. The Appellant's termination of parental rights hearing was not completed under the neglect-abuse statutory provisions *because* of his release. If he can withdraw his release and the case is remanded to the trial court in the neglect-abuse proceedings, fairness, justice, and the best interests of the children require this Court to direct the trial court to continue the matter as if the release had not occurred. The trial court should then proceed to a termination of parental rights hearing under the previously filed or an amended supplemental abuse-neglect petition, and require

the provisions of MCL 712B.15 be followed before making a determination about the final placement of the children.

CONCLUSION

The Sault Ste. Marie Tribe requests this Court affirm the Appellate Court's decision, and ensure any direction to the trial court protects the best interests of the children involved in the case.

Respectfully submitted,

/s/ Elizabeth Eggert

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Dated January 16, 2018

CERTIFICATE OF SERVICE

On January 16, 2018, Elizabeth Eggert certifies she served the Amicus Curiae Brief on counsel for petitioner, Emil Semaan, John Hunt, and Joshua D. Abbott, and counsel for the appellant, Vivek Sankaran, electronically immediately upon filing via the TrueFiling system. She also mailed a copy of the document above sent via US Postal Service first class mail to Appellee-Lawyer-Guardian ad Litem, Mark Torrice, at 42500 Hayes Rd. Ste. 100, Clinton Township, MI 48038-3641, and John Ange and Eric J. Smith, counsel for petitioner, Macomb County Prosecutor's Office, 1 South Main Street, 3rd Floor, Mount Clemens, MI 48043 on January 16, 2018.

/s/ Elizabeth Eggert

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